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OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California Corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,

Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation,

Real Parties in Interest.

BRIEF OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This case does not present any substantial Federal question.

The California Public Utilities Commission determined that, under California law, an agreement under which The Pacific Telephone and Telegraph Company (hereinafter "Pacific") permitted petitioner to place petitioner's own lines on Pacific's poles did not involve a public utility service. It held for this reason that the only provision of California law enforceable by the Commission which was invoked by petitioner was not applicable to the situation.

Petitioner challenges this decision, asserting (1) that petitioner was denied a hearing in contravention of the Fourteenth Amendment, and (2) that the decision results in unreasonable discrimination in contravention of the Fourteenth Amendment. Petitioner, however, has not shown that he was deprived of a hearing or that the decision in any way involves unconstitutional discrimination. The petition therefore should be denied.

QUESTIONS PRESENTED

Petitioner's "Statement of Grounds" (Pet., pp. 3-4) is not accurate and the questions stated by petitioner (Pet., p. 4) are not present in this case.

The only questions presented to the California Supreme Court were (1) whether the California Public Utilities Commission properly limited its hearing and decision to the applicability of a provision of California law en-

forceable by the Commission and (2) whether the Commission correctly decided that the provision of California law in question was not applicable. Petitioner asserted but could not establish before the California Supreme Court that it was deprived of a hearing or that the decision involved unconstitutional discrimination.

STATEMENT OF THE CASE

Petitioner's statement of the case and the proceedings below is not accurate. This case involves two different agreements entered into by Pacific: (1) an agreement between Pacific and petitioner which permits petitioner to use vacant pole space to affix its own lines on Pacific's poles (Appx. A to Pet., pp. 26, 33-35), and (2) an agreement between Pacific and All Metal Fabricators, Inc. (hereinafter "All Metal") which provides that Pacific will furnish a communication channel service to All Metal which All Metal would use to transmit its signals to its customers (Appx. A to Pet., pp. 27, 32). Contrary to the implications in the petition (Pet., pp. 13-14), Pacific has not denied petitioner permission to affix its lines to Pacific's poles. Nor has Pacific denied to petitioner a service such as that provided to All Metal. It is thus apparent that petitioner's real objective is protection from competition from other operators who might desire to enter the field and utilize the channel service provided by Pacific.

The proceedings before the Commission and its decision were expressly limited to "the issue of unjust discrimination under a provision of California law enforceable by this Commission," namely "the provisions against

preference or prejudice set forth in section 453 of the California Public Utilities Code"[1] (Appx. A to Pet., p. 36).

The Commission determined that the agreement between Pacific and All Metal, the terms of which are not in dispute, did involve public utility service, while the agreement between Pacific and petitioner, which is also not in dispute, did not involve such a service (Appx. A to Pet., pp. 32-35). It concluded that petitioner was therefore not in like or similar circumstances with All Metal and section 453 of the California Public Utilities Code was consequently not applicable (ibid., pp. 35-36). The Commission made no other findings, and the California Supreme Court affirmed the Commission's decision without an opinion.

I. PETITIONER RECEIVED A FULL HEARING

Petitioner's unsupported assertions (e.g., Pet., p. 14) that there was no hearing "on the merits" are without foundation. The pages of the opinion of the California Public Utilities Commission (Appx. A to Pet., pp. 4, 6) to which petitioner refers (Pet., p. 14) themselves belie those assertions. The first of these pages states that a hearing was held and that "evidence and argument were received" (Appx. A to Pet., p. 4). The paragraph con-

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[1]Section 453 of the California Public Utilities Code provides:

"No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

cludes: "answers and memoranda have been filed and considered, along with the complaint, Pacific's 'Offer of Proof' (filed prior to the hearing) and the evidence and argument adduced at the hearing" (ibid.). The second page to which petitioner refers shows some of the evidence which was before the Commission, i.e., the various agreements in question and correspondence between the parties (Appx. A to Pet., p. 6, ftn. 2).

In the record before this Court, there is no basis for petitioner's claim that it did not receive a full hearing before the Commission. Petitioner has not supported its naked assertions in this regard by bringing up the record before the Commission to show, if it could, that the proceedings were inadequate. In such a situation, this Court will accept the findings of the Commission as correct.

Miss. Valley Barge Co. v. U.S. (1934) 292 U.S. 282, 286;

Edward Hines Trustees v. U.S. (1923) 263 U.S. 143, 148;

Nashville Ry. v. Tennessee (1923) 262 U.S. 318, 324.

Moreover, there are in the record before this Court discussions of the proceedings before the Commission and also some verbatim excerpts from the transcript of the hearing which show that petitioner misinterpreted the scope of the hearing below.[2] In its complaint before the

[2]These discussions and statements appear in (1) petitioner's Petition for Writ of Review or Mandamus to the California Supreme Court, pp. 16-18, 24-25; (2) Answer of the Pacific Telephone and Telegraph Company, Real Party in Interest, to the Petition for Writ of Review, pp. 8-13, 4-8; and (3) Answer of Respondent, the California Public Utilities Commission, to Petition for Writ of Review, pp. 4-8.

Commission, petitioner included numerous allegations asserting various claims under California law such as breach of contract and violation of the State antitrust law (see Petition for Writ of Review to the California Supreme Court, pp. 24-25; Appendix A to Petition for Writ of Review, pp. 10-14). It is, however, settled law in California that the Commission's function is to regulate public utilities and to enforce their obligations as utilities rather than to enforce nonpublic utility rights and obligations (*Motor Transit Co. v. Railroad Commission* (1922) 189 Cal. 573, 579, 209 Pac. 586, 589; *Ashley v. Railroad Commission* (1922) 188 Cal. 234, 236, 204 Pac. 825; *Atchison Etc. Ry. Co. v. Railroad Com.* (1916) 173 Cal. 577, 581-582, 160 Pac. 828, 830, appeal dismissed (1918) 245 U.S. 638; *Goodspeed v. Great Western Power Co.* (1939) 33 Cal.App.2d 245, 264, 91 Pac.2d 623, 633). Therefore, petitioner's allegations other than asserted violation of section 453 of the California Public Utilities Code were irrelevant to the proceeding before the Commission and were properly treated as such. It was the failure of the Commission to hold a hearing on these issues which formed the principal basis of petitioner's petition to the California Supreme Court. Having received a hearing on the only relevant issue (the applicability of section 453), petitioner has no constitutional right to a hearing on irrelevant issues.

The scope of the Commission's decision is clear on its face:

> "Notwithstanding the great number and variety of questions raised, the essential issue framed by the pleadings in this case (as well as by the pleadings in All Metal's complaint against Pacific, Case No. 8421) is one of unreasonable discrimination, asserted to

have been practiced by Pacific in the provision of agreements for pole attachments and distribution channels in partially overlapping areas in Los Angeles County covered by complainant's and All Metal's local CATV franchises. We must determine whether there has been 'any preference or advantage' or 'any prejudice or disadvantage' granted to or suffered by complainant which may be contrary to the provisions of section 453 of the Public Utilities Code.

* * * * * * *

"Our decision herein will be limited to the issue which we consider to be the controlling one disclosed by the pleadings and arguments of the parties, namely, the issue of unjust discrimination under a provision of California law enforceable by this Commission.

"We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code." (Appx. A to Pet., pp. 31-36).

A denial by the California Supreme Court of a writ of review is an affirmance of the Commission's decision on the merits *(People v. Western Lines, Inc.* (1954) 42 Cal.2d 621, 633, 268 P.2d 723, 728, appeal dismissed 348 U.S. 859). The court below necessarily determined that the Commission properly limited its hearing and decision to a provision of State law enforceable by the Commission. Petitioner has thus failed to meet its burden of showing that the California Supreme Court decided the case on a substantial Federal ground *(Stembridge v. Georgia* (1952) 343 U.S. 541, 547; *Durley v. Mayo* (1956) 351 U.S. 277, 281-282).

II. THE COMMISSION'S DECISION IS REASONABLE AND INVOLVES NO UNCONSTITUTIONAL DISCRIMINATION.

In the decision below, the California Public Utilities Commission determined that:

1. Channel service provided by a telephone company either under a written contract or pursuant to a tariff offering constitutes "public utility service" (Appx. A to Pet., p. 32). All Metal had a channel service agreement with Pacific.

2. A pole attachment agreement does not constitute a "public utility service" offering (Appx. A to Pet., pp. 33-35). Petitioner had a pole attachment agreement with Pacific.

3. Petitioner was not in like or similar circumstances with All Metal and therefore Pacific did not violate the provisions of section 453 of the California Public Utilities Code against preferences or prejudice in the offering of utility service to All Metal (Appx. A to Pet., pp. 35-36).

Appellant asserts that this decision results in unreasonable discrimination in contravention of the Fourteenth Amendment (Pet., pp. 4, 18-22). It is plain, however, that there exist substantial distinctions between the two situations: Under a pole attachment agreement, the CATV operator is given permission to place *its own lines* on vacant pole space for a set fee per pole (see Appx. to Pet., pp. 26, 33). On the other hand, with respect to channel service, the telephone company constructs, owns, operates and maintains the equipment and provides a service to the CATV Company (see Appx. to Pet., pp. 27,

32). The Commission discussed these differences in its opinion. It pointed out that, in providing channel service,

> "Pacific constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use" (Appx. A to Pet., p. 32).

In regard to pole attachment agreements, the Commission observed:

> "Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of 'public utility service', since the utility does not hold out such contracts impartially to the general public or does it thereby provide any 'service' related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling" (Appx. A to Pet., p. 33).

These differences have been recognized in court decisions from other states which also have held that the rental of vacant pole space to CATV operators or others is not a public utility service.

Ceracche Television Corp. v. Public Service Com'n. (1960) 40 Misc.2d 554, 267 N.Y.S.2d 969, 972-973;

Consolidated Television Service, Inc. v. Leary (Ky. Ct.App. 1964) 382 S.W.2d 78, 80-81;

New York Teleph. Co. v. Telesystems Corp. (N.Y.S.Ct. 1965) 58 PUR3d 67, 69-70.

The distinctions have also been applied in decisions of public utilities commissions of other States. For example, in upholding a tariff for channel service, the New York Public Service Commission distinguished that service from other

> "• • • • ways in which antenna companies could conduct their operations. They could either build their own complete systems, including poles and cables, or attach their cables to poles owned by public utilities on which space had been rented.
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> • • • • • • •
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> "The telephone company does not propose, under its tariff T1, to become an antenna company. It is not going to sell any service to the owners of television sets or erect any master antennas. The service offering is limited to conveying (transporting or transmitting) for an antenna company, television signals from one point to another. Services of a like character are presently provided by the telephone company pursuant to filed tariffs; for example, the telephone company provides channels for teletypewriter, teleprinter, telephotography, telautograph, Morse, and fascimile communication. In addition, channels are provided for the transmission from point to point of program material such as music or other sound and for video program material. Similarly, the telephone company by offering channels to an antenna company is offering to provide a communication service—a variety of telephony or telegraphy—and nothing else."
>
> *(Re New York Telephone Company* (N.Y. PSC 1960) 34 PUR3d 115, 117, 121).

On the same grounds, commission decisions have uniformly held that the rental of pole space is not a public utility service.

WCOG, Inc. v. Southern Bell Teleph. & Teleg. Co. (N.C. Util. Com. 1966) 64 PUR3d 314, 316-319; *Jackson v. Michigan Bell Teleph. Co.* (Mich. PSC 1966) 63 PUR3d 384, 387.

And see *Re Southern Bell Telephone and Telegraph Company* (Fla. PSC 1966) 65 PUR3d 117, 120-121.

It is no answer for petitioner to merely assert, as it does (Pet. p. 20), that the distinction drawn by the California Public Utilities Commission (i.e., between a public utility communication service and an agreement which involves no public utility service) is irrelevant. As above shown, there are substantial differences which support that distinction. It is sufficient, in any event, under the Fourteenth Amendment if any state of facts reasonably may be conceived to justify the difference in treatment of the rental of pole space from the providing of channel service (*McLaughlin v. Florida* (1964) 379 U.S. 184, 191; *McGowan v. Maryland* (1961) 366 U.S. 420, 426).

III. THE COMMISSION'S DECISION IS SUPPORTED BY THE EVIDENCE.

Petitioner asserts as a separate ground that the Commission's decision was "not supported by substantial, or any, evidence" (Pet., p. 22). It is elementary that petitioner can state a Federal ground relating to the evidence only if the decision in question is "totally devoid of evidentiary support" (*Thompson v. Louisville* (1960) 362 U.S. 99). As we have pointed out (supra, p. 5), petitioner has failed to support its bare assertions regarding

lack of evidence and this Court will therefore accept the findings in question as correct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Dated at San Francisco, California, November 30, 1967.

Respectfully submitted,

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